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Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-
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DENIS J. O'CONNELL HIGH SCHOOL, BY ITS
BOARD OF TRUSTEES, *Petitioner*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL.,
Respondent.

—
On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

—
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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I. The Respondent's Exclusion of Non-Public Schools From Its Membership Does Not Violate the Petitioner's Right to Equal Protection, Since Such Classification Is Rationally Related to the Attainment of Reasonable State Objectives	4
II. The "Least Restrictive Alternative" Standard in Equal Protection Analysis Is Applicable Only Where State Action Has Affected Fundamental Rights, and Is, Therefore, Not Applicable to This Case	9
III. There Is Uniformity Among the Federal Circuits on the Proper Interpretation of the "Clearly Erroneous" Scope of Appellate Review, and the Decision of the Court of Appeals Is Consistent With That Interpretation	11
CONCLUSION	14
APPENDIX A: OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS	1a
APPENDIX B: OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA	14a
APPENDIX C: JUDGMENT OF THE COURT OF APPEALS	20a
APPENDIX D: ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING	21a

TABLE OF AUTHORITIES

CASES:

	Page
<i>Anderson v. United States</i> , 555 F.2d 236 (9th Cir. 1977)	13
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	4
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	6
<i>Commissioner v. Duberstein</i> , 363 U.S. 278 (1960)	12
<i>Dandridge v. Williams</i> , 397 U.S. 474 (1970)	10
<i>Dean Milk Co. v. Madison</i> , 340 U.S. 349 (1951)	9
<i>Dickens v. United States</i> , 545 F.2d 886 (5th Cir. 1977)	12
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	9
<i>Getty Oil Co. v. S.S. Ponce de Leon</i> , 555 F.2d 328 (2nd Cir. 1977)	12
<i>Glenview Park District v. Melhus</i> , 540 F.2d 1321 (7th Cir. 1976)	12
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	4
<i>Houston Oil Co. v. Goodrich</i> , 245 U.S. 440 (1918)	9
<i>Jones v. Pitt County Board of Education</i> , 528 F.2d 414 (4th Cir. 1975)	12
<i>Kargman v. Sullivan</i> , 552 F.2d 2 (1st Cir. 1977)	12
<i>Kinsey v. First Regional Securities, Inc.</i> , 557 F.2d 830 (D.C. Cir. 1977)	13
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976)	6
<i>McDonald v. Board of Election Commissioners of Chicago</i> , 394 U.S. 802 (1969)	6
<i>McGinnis v. Royster</i> , 410 U.S. 263 (1973)	6
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	6
<i>McLaughlin v. Florida</i> , 379 U.S. 184 (1964)	4
<i>Mitchell v. Louisiana High School Athletic Association</i> , 430 F.2d 1155 (5th Cir. 1970)	5
<i>Mustang Fuel Corp. v. Youngstown Sheet and Tube</i> , 561 F.2d 202 (10th Cir. 1977)	13
<i>Ostapowicz v. Johnson Bronze Co.</i> , 541 F.2d 394 (3d Cir. 1976)	12
<i>Oyama v. California</i> , 332 U.S. 633 (1948)	4
<i>Parish v. National Collegiate Athletic Association</i> , 506 F.2d 1028 (5th Cir. 1975)	5
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	4
<i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973)	5, 6, 9
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	4
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	9
<i>Shull v. Dain, Kalman and Qual, Inc.</i> , 561 F.2d 152 (8th Cir. 1977)	12

Table of Authorities Continued

	Page
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938)	5
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364 (1948)	12, 14
<i>Yates Motor Co., Inc. v. C.I.R.</i> , 561 F.2d 15 (6th Cir. 1977)	12
<i>Zenith Radio Corp. v. Hazeltine Research, Inc.</i> , 395 U.S. 100 (1969)	12

STATUTES:

28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	2, 7
Fed. R. Civ. P. 52(a)	11, 12, 14

OTHER:

<i>U.S. Const.</i> , Amend. XIV	2
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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a), is reported at 581 F.2d 81. The opinion of the district court (App., 14a-19a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978 (App., 20a). A timely petition for rehearing, with a suggestion for rehearing en banc, was denied on October 4, 1978 (App., 21a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a state-supported, unincorporated association, which regulates athletic and literary competition between its public high school members, may exclude private high schools from its membership when such exclusion serves to maintain distinct geographical districts for determining eligible participants, in order to facilitate enforcement of transfer rules, and to avoid student selection of schools on the basis of athletic programs in violation of the association's goals.
2. Whether, under established equal protection analysis, a state-supported, unincorporated association must adopt a less restrictive alternative to exclusion of private high schools from its membership.
3. Whether an appellate court may reverse a district court judgment on the basis of "clearly erroneous" findings of fact, when the appellate court determines with certainty, on the basis of the whole record, that a mistake was committed by the district court.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizen's of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the *United States Code* provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner's statement of the case is accepted with the following corrections: although nonpublic schools such as the petitioner compete in certain athletic and literary contests with member schools of the respondent League, these contests are not sponsored by the respondent. Only championship games conducted at the state, sectional, regional, and district levels are sponsored by the respondent, and nonpublic schools are excluded from such competition since the respondent's constitution limits membership to public high schools.

The court of appeals asserted a justification for the respondent's exclusionary rule, which was neither "speculative" nor "hypothetical," as claimed by the petitioner. On the contrary, there was evidence in the record to support the appellate court's finding that private schools draw students from a larger geographical area than public schools, and that this disparity would greatly hinder enforcement of various League rules pertaining to eligibility and transfer of participants if private schools were granted membership. (Transcript, 66-67)(App., 6a-7a). In addition, the court of appeals noted that "the actual and potential disparity in drawing area between public schools and private schools is beyond doubt," and that "the District Court should have given credence to the League's

assertion that public and private schools lack similar attendance zones." (App., 7a.)

ARGUMENT

I.

The Respondent's Exclusion Of Nonpublic Schools From Its Membership Does Not Violate The Petitioner's Right To Equal Protection, Since Such Classification Is Rationally Related To The Attainment Of Reasonable State Objectives.

Analysis of Equal Protection claims has evolved, in a long succession of cases brought before this Court, into a two-tiered approach which provides two distinct standards for evaluation of state action. The first of these is the rational basis standard, by which a state need only show some reasonable connection between its policy or action and a legitimate state interest. The more exacting strict scrutiny standard requires a state to justify its classification of the plaintiff by demonstrating that such categorization serves a compelling state interest or objective that could not be met by less restrictive means. The Supreme Court has employed the strict scrutiny standard only if it first found either that a fundamental right was infringed upon, or that a suspect classification was involved. [For "fundamental right" cases, see, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right of a uniquely private nature); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel). For "suspect classification" cases, see, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry).]

When applied to the petitioner's claim, the well-established two-tiered approach requires application of the rational basis standard to the respondent's membership rule. This is so because this case, as noted by the court of appeals, entails neither a fundamental right nor a suspect classification. (App., 5a.) Education, while recognized as an important service of the state, is not accorded the status of a fundamental right protected by the Constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973). Moreover, it has been held in separate cases that neither the participation in interscholastic athletics, nor the speculative possibility of scholarships or professional bonuses is a federally protected right. *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970); *Parish v. National Collegiate Athletic Association*, 506 F.2d 1028 (5th Cir. 1975).

Similarly, the challenged classification of nonpublic schools does not relate to the kind of "discrete and insular" minority which has been required for application of the strict scrutiny standard to suspect classifications. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The petitioner's claim does not hinge upon a suspect classification, because the class of nonpublic schools "is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez, supra*, at 29. In short, the petitioner's claim that its students have been denied their right to an equal opportunity to compete in interscholastic competition falls within the first "tier" of Equal Protection analysis. As such, the court of appeals correctly employed a rational basis

analysis in deciding the constitutionality of the exclusionary rule. (App., 5a.)

Specifically, the court of appeals applied the test from *McGowan v. Maryland*, 366 U.S. 420 (1961), to the effect that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 425-26. (App., 5a.)

The petitioner contends that the *McGowan* test is inappropriate to this case because it is normally applied to economic interests, and because it does not protect state classifications which are not specifically adopted pursuant to a statute. Neither of these arguments has sufficient merit to justify an abandonment of well-settled principles regarding interpretation of the Equal Protection Clause. The rational basis or "any conceivable basis" test has been applied to cases concerning a broad spectrum of affected interests, and its application is not confined to economic interests alone. See, e.g., *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969) (alleged discrimination in state absentee voting provision); *McGinnis v. Royster*, 410 U.S. 263 (1973) (alleged discrimination in state statute denying certain state prisoners good-time credit for parole eligibility). Instead, the rational basis test is appropriately used in any Equal Protection case which does not involve fundamental personal rights or inherently suspect distinction. *Rodriguez, supra*, 411 U.S. at 20; *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (age classification in mandatory retirement statute for policemen is rationally related to protection of public by assuring preparedness of police); *City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976) (ordinance which prohibited sale of foodstuffs from pushcarts in French

Quarter of New Orleans except by eight-year veterans of such businesses is rationally related to preservation of appearances and customs of community).

Although the exclusion of nonpublic schools from the respondent's membership is mandated by the respondent's constitution, and not by a state statute, it is undisputed that the respondent's acts were taken under color of state law. Were this not so, the petitioner would have been unable to bring this action under 42 U.S.C. § 1983. This being the case, the respondent's denial of the petitioner's membership application constitutes state action for all purposes, notwithstanding the absence of a statute on the subject. Accordingly, such action is constitutional under established Equal Protection analysis when, as here, it is related to legitimate state interests.

Having properly concluded that the respondent's exclusion of nonpublic schools from its membership was to be upheld if supported by a rational basis, the court of appeals then examined in detail the reasons presented by the respondent in support of its exclusionary rule. (App., 6a-11a.) These reasons, which comprise part of the record as statements made by League officials before the district court, were summarized by the court of appeals as follows:

- (1) League regulations are not sufficiently defined to determine the area from which private schools, many of which may now draw students from an unlimited geographical area, may draw eligible participants for League activities; (2) the lack of an attendance zone for private schools similar to that of public schools, each of which may draw students only from a specified geographical area, would make the transfer rule difficult to enforce and would give private school students an advan-

tage not enjoyed by public school students; (3) students eligible to attend private schools could choose to attend private schools or their public school on the basis of athletic programs in violation of the spirit of the League.

(App., 6a.)

When due consideration is given to these reasons for the challenged rule, and to the full consideration given by the court of appeals to their factual underpinnings, it is apparent that the court of appeals correctly found the classification of nonpublic schools to be rationally related to a legitimate state objective. (App., 12a.)

Aside from the fact that this case was properly decided on the merits by the appellate court, the case does not require the exercise of the Supreme Court's extraordinary jurisdiction by means of a writ of certiorari. As set forth previously, there is substantial uniformity in the pertinent body of case law as to the appropriate standard of review in Equal Protection claims which do not concern fundamental rights or suspect classifications. The petitioner has made no showing of any kind which would warrant a reexamination of settled principles. In addition the effects of the court of appeals' decision are essentially confined to private high schools in Virginia. Only four state associations comparable to the respondent currently bar nonpublic schools from their membership. Thus, this case lacks the national scope and importance which is a vital consideration in the Court's exercise of its discretion to hear the case by writ of certiorari. Jurisdiction to review by certiorari should be exercised sparingly, and should be limited to cases of peculiar gravity and general importance, or to cases involving principles which suffer from a pervasive conflict of de-

cisions. *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918). None of these requisite factors is present in this case, and the petition should, therefore, be denied.

II.

The "Least Restrictive Alternative" Standard In Equal Protection Analysis Is Applicable Only Where State Action Has Affected Fundamental Rights, And Is, Therefore, Not Applicable To This Case.

The petitioner asserts that the respondent League could have met its articulated objectives by some means short of excluding nonpublic schools, and that, because such alternatives were available but were not implemented, the membership rule is constitutionally defective under the Equal Protection Clause. The petitioner further suggests that the court of appeals improperly failed to apply such a "least restrictive alternative" standard to the instant case.

The fallacy in these contentions is made clear by the petitioner's own recognition that the rationale of this standard has been applied to cases involving *fundamental personal rights*. More important to this case is the fact that the least restrictive alternative test is not employed in cases where the affected rights are *not* fundamental in nature. It has been held specifically by this Court that "only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative." *Rodriguez, supra*, 411 U.S. at 52; cf. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Moreover, *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the case relied upon most heavily by the petitioner in this regard, was decided under the Commerce Clause and

thus has little relevance to determination of the proper standard to be applied in deciding an Equal Protection claim.

As discussed previously, this case does not involve a fundamental right under the Constitution. The "least restrictive alternative" standard, which is in reality only a component of the strict scrutiny test, is therefore inapplicable. The court of appeals recognized its function in cases of this kind when it stated:

"The task of the courts in passing on the validity of a classification under the standard Equal Protection test is not to determine if it is the best way, or even a good way, of accomplishing a legitimate state objective. Our task is only to determine whether the classification makes sense in light of the purposes sought to be achieved; beyond that point the wisdom of the state must be allowed to prevail. Having found that the classification here challenged is rationally related to a legitimate state objective, this Court has completed its consideration of the matter."

(App., 12a.)

This succinct statement of the Court's role in Equal Protection cases such as the one at bar reflects the correctness of the appellate court's decision in upholding the constitutionality of the respondent's exclusion of nonpublic schools from its membership. A state's classifications which are designed to achieve legitimate purposes, do not violate the Equal Protection Clause merely because the practice in question is imperfect, or results in some inequality, or fails to attack every aspect of a problem. *Dandridge v. Williams*, 397 U.S. 474, 486, 487 (1970). Under such circumstances, the practice does not offend established rights under the

Equal Protection Clause if it is rationally based and free from invidious discrimination. *Id.* at 488. It is apparent from the facts of this case and the appellate court decision that the respondent's membership rule in question is rationally based and that it cannot be characterized as invidious discrimination. Accordingly, the actions of the court of appeals were in all respects proper, and its refusal to apply a "least restrictive alternative test" to this case does not constitute a valid reason for granting the petitioner's request for a writ of certiorari. The law pertaining to this standard is well settled in the respondent's favor.

III.

There Is Uniformity Among The Federal Circuits On The Proper Interpretation Of The "Clearly Erroneous" Scope Of Appellate Review, And The Decision Of The Court of Appeals Is Consistent With That Interpretation.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact made by a trial court are not to be set aside unless they are found to be "clearly erroneous." *Fed. R. Civ. P.* 52(a). The petitioner argues that a conflict exists among the circuits as to the construction of this guide for appellate review, and that the writ should be granted so as to bring about a resolution of this alleged inconsistency. It is further contended that most circuits have adopted a narrow scope of review under *Rule 52(a)*, but that other circuits have created a disparity by construing the *Rule* as a permission for virtual *de novo* trials at the appellate level.

In reality, the alleged conflict does not exist, and there is virtual unanimity among the circuits on the implementation of *Rule 52(a)*. While holding that the

findings of a trial court are never conclusive, the Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), held that a finding is "clearly erroneous" under Rule 52(a) when, although there is evidence to support it,

"the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Id. 333 U.S. at 395.

Thus, while a trial court's findings of fact are entitled to great weight, they are not binding on an appellate court which has determined that a mistake was committed at trial. The interpretation of Rule 52(a) as set forth in *United States Gypsum Co., supra*, has been approved more recently by the Supreme Court. *Commissioner v. Duberstein*, 363 U.S. 278, 289-291 (1960); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Furthermore, case law from each of the federal circuits demonstrates the uniform approval of the view that a trial court's findings of fact should be reversed if the appellate court is firmly convinced that a mistake was made by the lower court, notwithstanding the existence of some evidence in support of the trial court's findings. E.g., *Kargman v. Sullivan*, 552 F.2d 2 (1st Cir. 1977); *Getty Oil Co. v. S.S. Ponce de Leon*, 555 F.2d 328 (2nd Cir. 1977); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976); *Jones v. Pitt County Board of Education*, 528 F.2d 414 (4th Cir. 1975); *Lickens v. United States*, 545 F.2d 886 (5th Cir. 1977); *Yates Motor Co., Inc. v. C.I.R.*, 561 F.2d 15 (6th Cir. 1977); *Glenview Park District v. Melhus*, 540 F.2d 1321 (7th Cir. 1976); *Shull v. Dain, Kalman, & Quail, Inc.*, 561 F.2d 152 (8th Cir. 1977);

Anderson v. United States, 555 F.2d 236 (9th Cir. 1977); *Mustang Fuel Corp. v. Youngstown Sheet & Tube*, 561 F.2d 202 (10th Cir. 1977); *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830 (D.C. Cir. 1977).

The record in the case at hand reveals with clarity the appellate court's firm conviction that the district court was mistaken in its finding that no proven factual basis substantiated the reasons given by the respondent for its exclusionary rule. Contrary to the petitioner's contention, the appellate court did not substitute speculation and hypothesizing in place of the district court's ruling. Rather, the court of appeals, on the basis of testimony given at trial by officials of the respondent association, found ample facts to support the stated reasons for the exclusion of private schools. (App., 6A.) In so doing, the appellate court set out to resolve what it regarded as a crucial mistake in the lower court's evaluation of the record before it. The appellate court's dissatisfaction with the district court's findings is further borne out by its statement that the trial court had "apparently ignored" perhaps the most important reason for the membership rule, as asserted by the respondent. (App., 8a.)

In short, the court of appeals found reversible error in the trial court's failure to recognize that sufficient evidence had been presented to establish a "conceivable basis" for the challenged rule. As discussed previously, such a minimal evidentiary foundation is all that is required to support the classification of the petitioner in this case. Having definitely found this mistake, the appellate court then properly corrected it in an opinion which sets forth its sound reasoning and its evidentiary support at some length. This result is entirely consist-

ent with the well-settled interpretation of Rule 52(a), as stated in *United States Gypsum Co., supra*, and in numerous subsequent cases in the federal courts. Accordingly, the propriety of the appellate court's decision, as well as the absence of conflict as to the appropriate scope of review, make the granting of a writ of certiorari in this case both unnecessary and inappropriate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ JOHN A. DEZIO

John A. DeZio

Counsel for Respondent

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS.

FOURTH CIRCUIT.

No. 78-1064.

DENIS J. O'CONNELL HIGH SCHOOL
by its Board of Trustees, *Appellee*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE ET AL., *Appellants*.

Argued March 8, 1978.

Decided Aug. 7, 1978.

• • • • • John A. Dezio, Charlottesville, Va., for appellants.

William G. McMurtrie, Falls Church, Va., for appellee.

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges.

DONALD RUSSELL, Circuit Judge:

The Virginia High School League (the League) appeals from a judgment of the District Court enjoining the League from denying Denis J. O'Connell High School's (O'Connell) application for membership in the League and from barring O'Connell from competing in League-sponsored championship athletic contests.

O'Connell is a state-accredited private non-profit Catholic high school located in Arlington County, Virginia. In February of 1977, O'Connell applied for admission to the Virginia High School League, Northern Region. The application was denied because the League's Constitution limits membership to public high schools.¹

¹ Section 8 (Membership) of the present League Constitution provides, in relevant part:

"8-1-1 Eligibility-Accredited state public high schools in Virginia shall be eligible for membership in the League. Membership shall be renewable annually."

The League is an unincorporated association of public high schools in Virginia under the sponsorship of the School of Continuing Education of the University of Virginia. With only one exception, every public high school in Virginia belongs to the League. In 1913 when the League was founded, its Constitution included both public and private secondary schools without distinction, but in 1925 the Constitution was changed so that only public high schools could be members, and that limitation remains today. The League is maintained by public funds derived in part from the University of Virginia, in part from local school boards, and in part from gate receipts from League-sponsored tournaments.

The League regulates, controls, and governs all athletic, literary and debating contests between and among its member schools. Private schools are invited by the League to participate as a distinct class in certain statewide tournaments, such as those involving tennis, debating and speaking. However, the private schools are excluded altogether from League sponsored tournaments involving such "major" sports as football, basketball and baseball.

O'Connell brought suit against the League pursuant to Section 1983, 42 U.S.C. and its jurisdictional counterpart, Section 1343(3), 28 U.S.C.,² alleging in its complaint that the League's refusal to admit O'Connell on the sole basis that it is a private school is an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment. The complaint further charged that, as a result of this exclusion, O'Connell's students choice of private education denies them the right to compete on a tournament level in sports such as football, basketball and base-

² O'Connell also brought suit under the Sherman Anti-Trust Act, alleging that the 27 Northern Region Principals had engaged in an illegal group boycott of O'Connell by declining to admit it into the League. This claim was abandoned at trial and not raised upon appeal.

ball, thus placing them in a less favorable competitive position than public high school students to receive athletic scholarships, professional bonuses, and other benefits that accrue to gifted athletes. The League submitted an answer denying the essential allegations of the complaint. Following the Court's denial of the League's Motion to Dismiss and Motion for Summary Judgment, the parties entered into a formal stipulation which was filed with the Court prior to trial. The stipulation stated, *inter alia*, that action by the League in supervising interscholastic competition is taken under color of state law and constitutes state action within the meaning of Section 1983, 42 U.S.C.

At trial, the League presented three basic arguments in defense of its policy of exclusion. First, the League asserted that because O'Connell had not been deprived of any federally protected right, there was no federal question presented so as to support federal jurisdiction alleged to be founded on 28 U.S.C. § 1343. Second, the League argued that its limitation of membership to public schools is rationally related to the League's interest in enforcing its eligibility rules concerning transfer students. The League presented testimony to the effect that, because public schools draw students only from strictly defined zones whereas private schools are not so limited, the League's transfer rules would be difficult to enforce with respect to private schools. Finally, the League argued that the admission of O'Connell, a parochial school, into the League would violate the Establishment Clause of the First Amendment. The Court held that (1) the question whether participation in the League's athletic program can be characterized as a right is not determinative of the Constitutional validity of the League's classification, (2) there is nothing in the record to support the asserted bases for the League's exclusion of private schools from League membership, and (3) the activities of the League neither advances nor inhibit religion, and any financial benefits supplied indirectly by the League to O'Connell in the form of

surplus proceeds from League-sponsored championship games would not constitute excessive governmental entanglement with religion so as to violate the Establishment Clause. Thus, because the exclusion of O'Connell from the League lacked a rational basis in violation of the Fourteenth Amendment, and because the inclusion of O'Connell in the League would not violate the First Amendment, the Court enjoined the League from denying O'Connell membership.

On appeal, the League first contends that the District Court erred in holding that jurisdiction exists under 28 U.S.C. § 1343. Section 1343 grants a District Court jurisdiction to redress a deprivation, under color of state law, of a right or privilege secured by the Constitution or federal law. The League's contention is essentially as follows: Since neither education, nor participation in interscholastic competition, nor the speculative possibility of acquiring an athletic scholarship, professional bonus or other emolument are rights secured by the Constitution or federal law, 28 U.S.C. § 1343 did not provide the District Court with jurisdiction over O'Connell's claim. Admittedly, education is not a fundamental right under the Constitution, *San Antonio Independent School District v. Rodriguez* (1973), 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16, and, of course, neither is participation in interscholastic athletics such a right. *Mitchell v. Louisiana High School Athletic Association* (5th Cir. 1970), 430 F.2d 1155, 1158. Nor is the speculative possibility of acquiring an athletic scholarship or professional bonus a federally protected property right. *Parish v. National Collegiate Athletic Association* (5th Cir. 1975), 506 F.2d 1028, 1034, n. 17. The right allegedly abridged, however, is not the right to education or the right to participate in interscholastic athletics; rather, the alleged abridgement is of the right of private school students to be treated similarly as public school students with regard to participation in interscholastic athletics where there is no rational basis for treating the two classes of

students differently. That is, O'Connell claims that its students have been denied their right to an equal opportunity to compete in interscholastic competition. A claimed denial of equal protection by state action arises under the Constitution and would normally be within the District Court's jurisdiction under Section 1343, unless unsubstantial or frivolous. *Baker v. Carr* (1962), 369 U.S. 186, 199, 82 S.Ct. 691, 7 L.Ed.2d 663; *Mitchell v. Louisiana High School Athletic Association*, *supra*, 430 F.2d at 1158. Under the facts of the present case, we cannot say that the claimed denial of equal protection lacks substance. Therefore, the District Court properly took jurisdiction of the claim pursuant to 28 U.S.C. § 1343.³

The League next contends that the District Court erred in holding that there is no rational basis for the provision of the League's Constitution limiting membership to public schools. We agree.

Where, as here, there is no fundamental right or suspect classification involved, the test to determine the validity of state legislation is whether the statutory classification bears some rational relationship to a legitimate state purpose. *San Antonio Independent School District v. Rodriguez*, *supra*, 411 U.S. at 17, 93 S.Ct. 1278; *Weber v. Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 172, 92 S.Ct. 1400, 31 L.Ed.2d 768; See generally *Developments in the Law—Equal Protection*, 82 Harv.L.Rev. 1065, 1076-1087 (1969). Furthermore, "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland* (1961), 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393.

³ See *Chabert v. Louisiana High School Athletic Association* (La. App. 1975), 312 So.2d 343, aff'd, 323 So.2d 774 (La. 1975).

The reasons for the League's exclusion of private schools, as established by the statements of two League officials, are as follows: (1) League regulations are not sufficiently defined to determine the area from which private schools, many of which may now draw students from an unlimited geographical area, may draw eligible participants for League activities; (2) the lack of an attendance zone for private schools similar to that of public schools, each of which may draw students only from a specified geographical area, would make the transfer rule difficult to enforce and would give private school students an advantage not enjoyed by public school students; (3) students eligible to attend private schools could choose to attend private schools or their public school on the basis of athletic programs in violation of the spirit of the League. The transfer rule cited by the League officials states, essentially, that when a student transfers from one high school to another without a corresponding change in district residence by his parents, the student is ineligible to participate in interscholastic competition for one semester at his new school.

In its Memorandum Opinion, the District Court stated that "[t]he only bases asserted by the League for excluding non-public high schools from League membership are their ability to draw students from a larger geographical area than the public high schools and the difficulty of enforcing the eligibility rules for transfer students." The Court found that "[n]either assertion is supported by the record—and no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools."

The Court's finding that there is no support in the record for the League's contention that private schools can draw students from a larger geographical area than public schools is based upon the failure of the League to introduce actual evidence to that effect. However, it is well-

known that many private schools in Virginia suffer no geographical limitation with respect to the areas from which they may draw students. Furthermore, even assuming that there are some Virginia private schools which do draw from strictly defined areas, these schools unlike their public counterparts, are not so limited by state law and could therefore at any time decide to modify or abolish their self-imposed drawing restrictions and recruit students from anywhere. And even assuming that some of these schools chose to continue drawing from strictly defined areas—an assumption the League is no obligated to make—these areas would overlap with the areas from which public schools can draw. Therefore, because the actual and potential disparity in drawing area between public schools and private schools is beyond doubt, the District Court should have given credence to the League's assertion that public and private schools lack similar attendance zones.

Given the lack of specifically defined drawing areas with respect to many private schools, it is obvious that the admission into the League of private schools would create difficulties in the enforcement of the transfer rule. Although the difficulty of applying the rule to students transferring from private to public schools might not be affected,⁴ surely additional difficulties would arise in applying the rule to students transferring from either private or public schools to "zoneless" private schools. Since the school to which the student transfers would be lacking a district in which his parents could establish residence, it

⁴ A Note to § 28-6-2 of the Rules and Regulations of the League provides that the Transfer Rule applies equally "to a transfer from a private school to a public school as to a transfer from one public school to another." Thus, whether or not private schools become League members, the parents of a student transferring from a private to a public school would presumably need to reside in the public school district following their child's transfer in order for the child to be immediately eligible to participate in the public school's athletic programs.

would seem that any student transferring to a "zoneless" private school would necessarily be ineligible to participate in that school's athletic programs for one semester—even if his parents moved next door to the school. Thus, any student transferring to a "zoneless" private school would be victimized by the application of the transfer rule to a situation that it was never meant to cover.

In addition to the problems created by the application of the transfer rule to private schools lacking attendance zones, the League asserted another basis, apparently ignored by the District Court, for restricting its membership to public schools. A League official stated that if private schools became members, students eligible to attend such private schools could choose to attend those schools or their public school on the basis of athletic programs "in violation of the spirit of the League." Although there was no elaboration by the League official as to exactly what this "spirit" is, an examination of the League Constitution and the League Rules and Regulations shows that the placing of great emphasis by a student upon athletic programs in deciding what school to attend does indeed violate "the spirit of the League." Section 6 of the League Constitution states that the object of the League is "to foster among the public high schools of Virginia a broad program of supervised competitions and desirable school activities *as an aid in the total education of pupils.*" (emphasis added) Rules and Regulations Section 26-1-1 states that their purpose is "*to protect and preserve the educational values inherent in [interschool] activities.*" (emphasis added) Obviously, the transfer of a student from one school to another solely to participate on the athletic teams of the latter school does not come within the "spirit" of these two sections. More specifically, Section 27-10-1 (Proselyting Rules) states: "*No member school or group of individuals representing the school shall subject a student from another school to undue influence by encouraging him to transfer from one school to another for League activities.*"

(emphasis in text) And Section 28-8-3(8) states that "[a]ny student who accepts material or financial inducement to attend a school for the purpose of engaging in athletics, regardless of the source of that material or financial inducement, shall be ineligible" to represent his school in any interschool athletic contest. The sections quoted above serve to illustrate the League's concern that students not be subjected to pressures by coaches, fan and other interested parties to attend one school over another. And, of course, the objective of the transfer rule, which makes a student ineligible to compete for one semester where his move to a new school is not accompanied by a corresponding change in residence by his parents, is basically the same—to deter those who would pressure a student to transfer and to deter the student from succumbing to such pressures by preventing him from becoming immediately eligible to compete at his new school.

The concerns addressed by the above mentioned sections have been recognized by other courts as problems that need to be addressed. In rejecting an attack upon the constitutional validity of a transfer rule imposed by the Louisiana High School Athletic Association, a federal District Court stated that "[t]he transfer rule was adopted to prevent recruiting of school children by overzealous athletic coaches, fans, and school faculty. . . All parties to this suit agree that this sort of recruiting of school children to engage in athletic competition may be considered harmful by the state, and that it may take steps to prevent this harm." *Walsh v. Louisiana High School Athletic Ass'n.* (E.D.La. 1977), 428 F.Supp. 1261, 1264. In another case involving a challenge to the application of a transfer rule, the Louisiana Court of Appeals stated:

"Past history, and especially recent events, have shown the unconscionable actions to which some individuals will resort in order to insure themselves of a superior athletic program. Illegal recruiting of promis-

ing young athletes is the gravamen of this recurring problem. Not only is the atmosphere of fair competition irreparably clouded, but many times the lives of the athletes themselves in that athletics becomes primary and academicism secondary under the overbearing scrutiny of those who would entice through illicit means. It is unarguable that any state has an interest in prohibiting such occurrences in its high schools. One means towards such a prohibition is to impede those who would be the innocent objects of illegality from being immediately profitable to the perpetrators. Certainly the advantages of such undisciplined activity are considerably lessened by the application of the rule complained of herein." *Chabert v. Louisiana High School Athletic Association* (La.App. 1975), 312 So.2d 343, 346.

The language of these two cases makes it clear that the State is justified in taking any reasonable step to prevent actual or potential abuse of student athletes by those persons who would recruit these students for their athletic ability. Certainly, therefore, reasonable measures taken to reduce or remove the possible temptation to make a choice of schools on the basis of their respective athletic programs are justified.

At present a student who desires to engage in League-sponsored tournaments is not exposed to a potentially tempting choice of schools; of the public schools, he is usually eligible to attend only the one serving the district in which he lives, and private schools are ineligible for League tournament competition. If, however, private schools were admitted to the League, a student eligible to attend such schools could choose to attend any of them or to attend his public school, thus exposing himself to the potential pressures that the League seeks to forestall, and perhaps basing his ultimate choice on athletic considerations in violation of the above mentioned "League spirit."

Nor would the transfer rule be effective to deal with such a situation, for that rule applies only to transfers from one secondary school to another, and not to the initial choice of a secondary school. Moreover, the transfer rule would also be inadequate to deal with the situation where a student's residence falls within the district of a private school as well as that of his public school. In such a case the student could presumably transfer back and forth between the two schools without suffering any ineligibility—again, exposing himself to those pressures—and temptations against which the League attempts to protect its students.

Against this background, the League's exclusion of private schools must be viewed as one of several reasonable steps taken to combat the serious problem of adolescent students being subjected to and perhaps succumbing to pressures to attend one school over another on the basis of athletic considerations. That there was no evidence presented to establish the existence of such a problem in Virginia is not important, for not only do several provisions of the League's Constitution and Rules and Regulations show clearly the League's concern with the possible occurrence of such activities, but experience elsewhere has shown that this is indeed a problem which needs to be addressed.⁵ And "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."⁶

Also inconsequential is the fact that there may be means of addressing the problem other than by blanket exclusion of private schools which may result in less hardship to students at private schools such as O'Connell. The task of the courts in passing on the validity of a classification under the standard Equal Protection test is not to de-

⁵ *Walsh, supra*, 428 F.Supp. 1261.

⁶ *McGowan v. Maryland, supra*, 366 U.S. at 426, 81 S.Ct. at 1105.

termine if it is the best way, or even a good way, of accomplishing a legitimate state objective. Our task is only to determine whether the classification makes sense in light of the purpose sought to be achieved; beyond that point the wisdom of the State must be allowed to prevail. Having found that the classification here challenged is rationally related to a legitimate State objective, this Court has completed its consideration of the matter.

Because we find that the League may constitutionally exclude private schools from League membership, we do not address League arguments concerning burden of proof, nor do we address the League contention that the admission of a private sectarian school such as O'Connell would violate the Establishment Clause of the First Amendment.

Accordingly, the judgment below is reversed.

REVERSED.

BUTZNER, Circuit Judge, dissenting:

I agree that the district court properly took jurisdiction in this case, but I would affirm the judgment.

Denis J. O'Connell High School brought this action because its exclusion from the Virginia High School League handicaps its students who compete for athletic scholarships and other benefits available to talented athletes. To explain its exclusion of private and parochial schools, the League cited the ability of these schools to draw students from a wider geographic area than public schools and the difficulty in enforcing the eligibility rules for transfer students.

Quite properly, the district court rejected these arguments. The geographic areas from which public schools draw vary widely in size and population. There is ample evidence to support the district court's determination that the League's asserted justifications for excluding private and parochial schools lack a factual foundation. Since this

finding is not clearly erroneous, it is binding on us. Fed. R.Civ.P. 52(a).

Moreover, the cases cited to support the League's policy concern no-transfer rules within an association including public, private, and parochial schools. See *Walsh v. Louisiana High School Athletic Ass'n*, 428 F.Supp. 1261 (E.D. La.1977); *Chabert v. Louisiana High School Athletic Ass'n*, 312 So.2d 343 (La.App.), aff'd 323 So.2d 774 (La.1975). No case approving a policy excluding non-public schools from an athletic association has been cited. The fact that the Louisiana association operates and enforces a no-transfer rule successfully without excluding private and parochial schools belies the League's argument.

Because the record discloses no factual basis for concluding that the League's exclusionary rule bears some rational relationship to the state's purpose, I am persuaded that the district court correctly decided that the rule violated the equal protection clause. See *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). The district court also properly held that admission of Denis J. O'Connell High School to the League would not violate the establishment clause of the first amendment. See *Wolman v. Walter*, 433 U.S. 229, 235-36, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). Consequently, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 77-412-A

BISHOP DENIS J. O'CONNELL HIGH SCHOOL, ETC.,
Plaintiff

v.

THE VIRGINIA HIGH SCHOOL LEAGUE, ET AL., *Defendants*

MEMORANDUM OPINION

The plaintiff, Bishop Denis J. O'Connell High School, brought this suit against The Virginia High School League and the named high school principals for damages and injunctive relief under 15 U.S.C. § 1 and 42 U.S.C. § 1983.

O'Connell claims that the League has unlawfully prohibited its students from participating in League-sponsored district, regional and state championships in those sports which draw large gate receipts and public recognition solely on the basis of its status as a private sectarian high school.

The high school principals have been dropped as party defendants and the Sherman Act claim has been abandoned.

Jurisdiction and venue are not questioned, and the League now concedes that its actions in the premises were taken under color of state law within the meaning of 42 U.S.C. § 1983.

The material facts are not in dispute—most were stipulated.

The Bishop Denis J. O'Connell High School is a state-accredited private non-profit Catholic high school located in Arlington County, Virginia, consisting of some 1,600 students, most of whom are Roman Catholics.

O'Connell applied for admission to The Virginia High School League, Northern Region, in February of 1977. The application was denied because the League's constitution limits membership to public schools.

Membership in the League originally included both public and private secondary high schools—Membership since 1925 has been limited to public schools.

The Virginia High School League is an unincorporated association of public high schools in the Commonwealth of Virginia under the sponsorship of the School of Continuing Education of the University of Virginia.

The League is maintained by public funds derived in part from the University of Virginia, in part from local school boards, and in part from gate receipts from League-sponsored district, regional and state athletic tournaments.

It regulates, governs and controls all athletic, literary and debating contests between and among its member schools—It permits non-public schools to compete on an equal basis with public schools in certain sports and literary contests for statewide prizes, but prohibits them from competing in League-sponsored championship football, basketball and baseball games.

O'Connell claims that its exclusion from League membership places its students who have chosen a non-public school education in a less favorable position than those who have chosen a public school education to receive athletic scholarships and the other benefits that accrue to gifted athletes, and that the League's distinction between public and non-public schools constitutes an arbitrary classification violative of the Equal Protection Clause of the Fourteenth Amendment.

Tournament competition is the lifeblood of gifted athletes—Barring O'Connell from competing in League-sponsored championship games denies its students the equal protection of the laws.

Athletics were recognized as part of the educational process and were subject to the Equal Protection Clause of the Civil Rights Acts. See 15 Am.Jr.2d § 88 and the cases cited in fn. 48.

The League argues that O'Connell has not been deprived of any federally protected right and that a rational basis exists for limiting its memberships to public schools.

The question of whether participation in the Virginia high school athletic program can be characterized as a right is not determinative of the validity of the League's classification. See *Graham v. Richardson*. 403 U.S. 365, 374 (1971).

Having been duly licensed and accredited by the State of Virginia, O'Connell cannot be denied benefits granted other Virginia schools unless the classification upon which the denial is based is founded upon some difference rationally related to a legitimate government interest.

The only bases asserted by the League for excluding non-public high schools from League membership are their ability to draw students from a larger geographical area than the public high schools and the difficulty of enforcing the eligibility rules for transfer students.

Neither assertion is supported by the record—and no reason was suggested why the League's rules could not be uniformly applied to both private and public high schools.

Therefore this Court finds that the League has failed to establish a rational basis for limiting League membership to public high schools.

Although not asserted in its answer or motion to dismiss, the League now argues that the admission of O'Connell would violate the Establishment Clause of the First Amendment to the Constitution of the United States.

This belated argument is without support in fact or law.

The Virginia High School League was created solely for the purpose of fostering among the public high schools of Virginia a broad program of supervised competitions and desirable school activities as an aid in the total education of pupils—Its activities neither advance nor inhibit religion.

Notre Dame and other nationally known Catholic schools have long competed with the United States military academies and many state universities and has shared in the gate receipts and other benefits derived from such athletic competitions—Many Catholic and other sectarian and private high schools in most of the States compete with the public high schools in state athletic championship contests—and no one, as far as we know, has ever claimed that such competitions are prohibited by the Constitution of the United States.

All athletic contests between high schools, colleges and even in the professional ranks are now conducted without regard to race, creed, color or national origin of the players, coaches and schools.

Practically all of the proceeds from League-sponsored championship games over and above the actual expenses go to maintain the League—Only on rare occasions has the total income been sufficient to permit a little to trickle down to the participating schools.

Even though the benefits thus supplied indirectly by the League to its members are paid for in part by government funds, such contributions do not foster an excessive governmental entanglement with religion.

As was stated by Mr. Justice Powell in *Wolman v. Walter*, — U.S. — (No. 76-496, June 24, 1977):

"... This Court [Supreme Court of the United States] has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them."

The Bishop Denis J. O'Connell High School is a well known Northern Virginia Catholic-supported institution—and the record here made clearly supports the inference that it was denied membership in the League solely on the basis of its status as a private sectarian high school. No other reasonable inference is supported by the record, and no other explanation has been offered.

It is conceded that O'Connell otherwise qualifies for membership in the League.

Therefore The Virginia High School League will be enjoined from denying Bishop Denis J. O'Connell High School's application for membership in the League and from barring O'Connell from competing in League-sponsored championship athletic contests.

Counsel for the plaintiff will prepare an appropriate order in accordance with this memorandum opinion, submit it to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send a copy of this memorandum opinion to all counsel of record.

/S/ ILLEGIBLE

United States Senior District Judge

October 28, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1064

DENIS J. O'CONNELL HIGH SCHOOL,
BY ITS BOARD OF TRUSTEES, *Appellee*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE; WILLIAM LADSON, PRINCIPAL; R. DON FORD, PRINCIPAL; Ms. DORIS TORRICE, PRINCIPAL; THOMAS HYER, PRINCIPAL; EMORY CHESLEY, PRINCIPAL; JAMES G. FINCH, PRINCIPAL; JOHN W. ALWOOD, PRINCIPAL; ROBERT E. PHIPPS, PRINCIPAL; ROY VOLRATH, PRINCIPAL; CLARENCE DRAYER, PRINCIPAL; DR. JAMES WILSON, PRINCIPAL; JOHN T. BROADDUS, PRINCIPAL; RICHARD JOHNSON, PRINCIPAL; AND T. PAGE JOHNSON, PRINCIPAL,
Appellants.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed August 7, 1978.

WILLIAM K. SLATE, II, Clerk.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1064

DENIS J. O'CONNELL HIGH SCHOOL,
BY ITS BOARD OF TRUSTEES, *Appellee*,

v.

THE VIRGINIA HIGH SCHOOL LEAGUE; WILLIAM LADSON, PRINCIPAL; R. DON FORD, PRINCIPAL; Ms. DORIS TORRICE, PRINCIPAL; THOMAS HYER, PRINCIPAL; EMORY CHESLEY, PRINCIPAL; JAMES G. FINCH, PRINCIPAL; JOHN W. ALWOOD, PRINCIPAL; ROBERT E. PHIPPS, PRINCIPAL; ROY VOLRATH, PRINCIPAL; CLARENCE DRAYER, PRINCIPAL; DR. JAMES WILSON, PRINCIPAL; JOHN T. BROADDUS, PRINCIPAL; RICHARD JOHNSON, PRINCIPAL; AND T. PAGE JOHNSON, PRINCIPAL,
Appellants.

Order

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell with the concurrence of Judge Widener. Judge Butzner dissents.

Filed October 4, 1978.

FOR THE COURT,

/s/ WILLIAM K. SLATE, II
Clerk